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DRAFT REPORT OF COMMITTEE E OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.*

As the practice stands, it is fundamental in criminal procedure that the prosecution must prevail both on the merits and on procedure; while, in consequence, the accused may prevail on either. Our aim ought to be to reduce the possibilities of disposition of a prosecution, or even delay of it, upon purely procedural points to the inevitable minimum. But the problem of reform of criminal procedure is not the same in all jurisdictions. Some have gone not a little way in legislative improvement. Others have merely made a beginning. It seems best, therefore, to confine this first report to a few general points of fundamental importance. Accordingly, with respect to criminal pleading, your committee begs to report three general propositions and to add by way of appendix the rules proposed in England by H. L. Stephen, which deserve careful consideration by all who have to do with reform of criminal pleading.

I. It should be made permissible in all jurisdictions to prosecute any and every species of offense by information, after examination and commitment by a magistrate, permitting also prosecution by indictment with or without such examination and commitment.

This practice is in force in whole or in part in the following jurisdictions:

California, Const., Art. 1, Sec. 8, Penal Code, Secs. 915-929.

Colorado, Const., Art. 2, Sec. 23, Rev. St. 1908, Sec. 1957.

Connecticut, Gen. St. 1902, Sec. 1487.

Florida, Gen. St. 1906, Sec. 3956—applying to all but capital crimes when prosecuted in the Criminal Court of Record. See Sec. 3865.

Idaho, Rev. Codes, Sec. 7655.

Indiana, Const., Art. 7, Sec. 17, Burns Ann. St., Sec. 1747.

Kansas, Gen. St. 1905, Sec. 5952.

Louisiana, Const., Art. 9, Rev. St., Sec. 977.

Michigan, Comp. Laws 1897, Sec. 11933.

*This draft was prepared by Professors Roscoe Pound, Howard L. Smith and W. E. Higgins. The other members of the committee were Judge Albert C. Barnes, Professor W. E. Mikell and Frederick Bausman, Esq.

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Minnesota, Const. Amendment adopted 1906, Gen. Laws Minn. 1905, p. 4, Act of 1905, Gen. Laws, 1905, Chap. 231.

Missouri, Ann. St. 1906, Sec. 2476.

Montana, Rev. Codes, 1907, Sec. 9102.

Nebraska, Const., Art. 1, Sec. 10, Crim. Code, Sec. 578.

North Dakota, Rev. Codes, 1905, 9791.

Oklahoma, Const., Art. 2, Sec. 17.

Oregon, Ballinger & Cotton's Crim. Codes & Stats., Sec. 1258.

South Dakota, Code Cr. Proc., Sec. 205.

Utah, Const., Art. 1, Sec. 13.

Vermont, Pub. St. (1906), Sec. 228.

Washington, Ballinger's Ann. Codes & St., Secs. 6801-6802.

Wisconsin, Sanborn & Berryman's St., Sec. 4648.

Wyoming, Rev. St. 1895, Sec. 5189.

In *Illinois* such a practice is authorized by the constitution (Art. 2, Sec. 8), and was adopted by statute for the Municipal Court of Chicago (Laws of 1907, p. 225, Sec. 27). But it has been limited by a recent decision so as to become substantially unavailable. See 5 Ill. Law Rev., 108.

There is but one limitation common to all the foregoing jurisdictions; namely, the one contained in the proposition submitted, that information should be preceded by examination before a magistrate and commitment. Some of the jurisdictions require an indictment in cases where the crime is capital. Some others except homicide and treason from prosecution by information. One or two require indictment when a grand jury is in session at the time. But no evil results appear to have come from adoption of this procedure for all cases, and no jurisdiction which has adopted the practice, so far as your committee has been able to learn, would think of abandoning it.

The following reasons for the change may be urged:

1. Informations may be amended with some freedom, whereas even with legislation, amendment of indictments, under the decisions, raises serious difficulties.

2. Since private prosecution has been superseded by prosecution by an elective public officer, indictments by grand juries are no longer needed as security for individual liberty. The malice of private prosecutors, no doubt, required some check beyond liability to damages for malicious prosecution. But to-day all prosecutions are in charge of a public official. His office is elective. His actions are public and are at all times scrutinized severely. There is no reason

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to apprehend danger to individual accused persons from prosecutions by information, and no ill results have appeared where the practice has been in use.

3. The expense of prosecution by indictment is considerable, not only in the first instance in drawing, summoning and providing for the grand jurors, but thereafter because of the new trials necessitated through defects in the constitution of the grand jury, and the difficulty or impossibility of amending their indictments. During 1909, the reports show that eleven prosecutions failed in our higher courts, and had to begin anew because of errors in the constitution of the grand jury or in the procedure before it.

4. Except in cases attracting wide-spread attention (usually political) indictment is becoming a mere form. The witnesses are heard hurriedly and the prosecuting officer determines in practical effect whether there shall be a prosecution.

5. The inconvenience to prosecuting witnesses is great and often operates to prevent prosecutions which are demanded by public interest. This is true especially in cases of assaults upon women. The requirement of (1) complaint before a magistrate, (2) appearance at a preliminary examination, (3) narration to the prosecuting officer in order that he may determine whether to act, (4) testifying before the grand jury, (5) testifying at the trial with the incident delay and expenditure of time and even of money often imposes an unfair burden upon prosecuting witnesses. See Train, *The Prisoner at the Bar*, Chap. VII.

II. *Amendment of indictments and informations should be allowed* (1) *as to all formal matters in any court at any time*, (2) *in order to prevent variance by the trial court, before or during trial upon such terms as will afford to the accused reasonable notice and opportunity to make his defense*, (3) *after trial, to conform to the proofs, either in the trial court or in a court of review, where the variance was not expressly brought to the attention of the trial court when the evidence was offered and the trial proceeded without claim by the accused that he was not properly notified of the case actually made against him.*

In view of the course of decision in states which have enacted statutes providing for amendment of indictments, it is possible that in many jurisdictions constitutional amendments would be required to make reform in this matter complete and effectual. But the difficulty is more formal than substantial. Now that private prosecution has become obsolete, in fact, whatever the form, the language of the in-

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dictment is that of the public prosecuting officer who drew it. All that the grand jury really does, or can be expected to do, is to consider whether there is probable cause to prosecute the accused for a certain type of crime. The details it leaves and must leave to the officer chosen to prosecute. Hence, so long as the basis of the prosecution remains the same, i. e., so long as the situation of fact presented to the trial jury is in substance that presented to and considered by the grand jury, every real purpose of the constitutional guarantee is subserved. Where constitutions restrict prosecution by information to cases where there has been a preliminary examination and commitment, an analogous situation exists. There is every reason (except the formal one that the grand jury having been discharged, the body that found the indictment no longer exists to amend it) for the same latitude of amendment in the one case as in the other.

Even if prosecution by information becomes, as it should, the ordinary mode of procedure in all jurisdictions, legislation with respect to amendment of indictments will remain desirable. For prosecution by indictment will, no doubt, be retained for exceptional cases; and it is in these very cases that obviating so far as possible all danger of miscarriage of justice on mere points of procedure becomes of the first importance to the law and to society.

III. *The office of an indictment or information should be (1) to give the accused notice of the crime with which he is charged and of the case on the facts which will be made against him, (2) to set out the facts constituting the alleged offense with sufficient exactness to support a plea of former conviction or former acquittal, as the case may be. The further office of providing a formal basis for the judgment of conviction, so that the indictment or information must set forth everything which is necessary to a complete case on paper, no longer serves any useful end, produces miscarriages of justice, and should be done away with.*

A chief object of reform of procedure, both criminal and civil, must be to insure trial and review of the case rather than the record. The present practice amounts to record-worship. The reasons therefor are purely historical. Partly it is a remnant of the old mode of determining causes, so far as possible, by some arbitrary mechanical agency. Partly it had its origin in a just fear of fraud at a time when amendments could only be made by erasure of a parchment record, the reasons for which have been obsolete for centuries. Chiefly it grew out of the exigencies of the old mode of review by writ of error, now superseded in most jurisdictions by the more mod-

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ern appeal. When review could only take place by inspection of the parchment record in a search for error, it was necessary that the indictment set out a complete case against the accused, disclosing every element of the crime, since the court of review could only know what was proved from what was averred. To-day causes may be and are reviewed on the case made at the trial. But we still continue to review the case made in the indictment also. Under modern conditions, the latter review serves no useful end. No cause which has been tried on evidence should be reviewed solely upon pleadings. If a case was made at the trial, the question should be whether the accused was fairly notified thereof, and had a fair opportunity to meet it and to present his own case, not whether the record would sustain a judgment at common law.

Nor is a complete statement of all the elements of a crime necessary to permit the record to be used as the basis of a plea of former conviction or of former acquittal. If sufficient notice is afforded the accused, surely others who have reason to read the indictment will be able to perceive what was charged and tried. The better an indictment fulfils the purpose of notice to the accused, the more thoroughly it will meet the requirement of record upon which to maintain a defense of former conviction or of former acquittal. Perhaps no practice will do away entirely with the need of extrinsic evidence in such cases. Under the present practice it must be resorted to frequently.

Moreover, it must not be forgotten that our present practice sometimes develops the formal office of the indictment, namely, the office of sustaining the judgment of conviction on paper at the expense of the chief substantial office, namely, the office of affording notice to the accused. This is often true in cases of statutory offenses, where it is permissible to charge the offense in the very language of the statute (e. g. *Steuer v. State*, 59 Wis., 472). It is even more true in some jurisdictions where legislative zeal to insure conviction of offenders against certain statutes has provided for an indictment in general terms. The way to get rid of the difficulties growing out of the formal function of indictments is not through such impairment of their substantial function. As H. L. Stephen has put it, "the prisoner should have notice of all the law and all the facts which will be cited against him." But the question should be whether he had such notice. If he has, the function of the indictment is performed. The question, then, should be as to the case made at the trial. To-day there is no difficulty in

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showing an appellate tribunal exactly what that case was. We do not need an elaborate indictment to that end.

Most jurisdictions to-day have penal codes or criminal codes. An indictment referring to the section on which it is founded, followed by "so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to" would accomplish every real purpose of criminal pleading.

The following forms proposed (for England) by H. L. Stephen will illustrate how indictments might be drawn :

LARCENY.

"The grand jury charge A with larceny against the Common Law and the Larceny Act, 1861, Sec. 4.

"And they present that on the 10th of April, 1898, he stole a watch, the property of B."

EMBEZZLEMENT.

"The grand jury charge A with embezzlement under the Common Law and the Larceny Act, 1861, Sec. 68."

"They present that on the 10th of April, 1897, he was clerk to B, and as such received £5 from C, which he embezzled."

FALSE PRETENSES.

"The grand jury charge A with obtaining money by false pretenses with intent to defraud under the Larceny Act, 1861, Sec. 88.

"They present that on the 10th of April, 1897, A obtained £5 from B by pretending that a cheque drawn by himself on the London and Westminster Bank was a good order for the payment of that sum and the bank had agreed to pay the amount thereof."

COMMON ASSAULT.

"The grand jury charge and present that A on the 10th of April, 1897, committed a common assault on B, contrary to 24 and 25 Vict. c. 100, s. 47."

PERJURY.

"The grand jury charge T. S. with wilful and corrupt perjury against the Common Law and 5 Eliz. c. 93, and 2 Geo. II, c. 25.

"And they present that on the 10th of April, 1897, S. K. was tried at Warrington Petty Sessions for selling beer during closing hours on Sunday. T. S. was sworn as a witness and said: 'I was

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never in the house at all that day, and never saw the policeman before in my life. I never was in Burtonwood at all that day. I had not been in it for a fortnight before that day.' These statements were all false to his knowledge when he made them."

The second problem submitted to your committee for investigation was the elimination "of unnecessary technicalities in the procedure of appeals and reverses of judgment in criminal cases."

In reality this raises the whole question of trial procedure in criminal cases. The fundamental principle by which we should be guided in respect to criminal procedure is to make it unprofitable for counsel to raise questions of procedure except to develop the merits of the cause fully and to assure to the accused full and fair notice of the case against him and a full and fair opportunity to meet it. No one reform will bring this about entirely. But much may be done by distinguishing between rules intended to secure orderly dispatch of business on the one hand, and rules intended to protect the substantial rights of the accused on the other hand. The former, that is, rules intended to provide for orderly dispatch of business with consequent saving of public time and maintenance of the dignity of tribunals, ought to be no concern of the accused unless under exceptional circumstances. It should be for the tribunal, not the party, to object in such cases, and decisions in respect to such rules should be reviewable only for abuse of discretion. The objection urged against this view is that it is unsafe to give discretionary power to judges. But the judge may have no more discretion than he has now in respect to rules which afford protection to substantial rights, and yet the accused may be limited to the use of those rules in such way as to secure fair notice of the case against him and fair opportunity to present his own case and nothing more. Without giving the trial judge any additional power, it may be insisted that the accused use rules of procedure not to lay the foundation for review in another court in the future but to obtain his substantial rights in the present.

Accordingly, the following propositions are suggested:

I. *Rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals should be distinguished carefully from rules intended to secure to the accused a fair opportunity to meet the case against him and a full opportunity to present his own case; rulings upon the former class should be reviewable only for abuse of discretion and nothing should depend on, or be obtainable through, the latter class except the securing of such opportunity.*

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II. *No prosecution should be thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved.*

This principle has been objected to when applied to civil proceedings on the ground of hardship to defendants in being called upon to go into an improper forum and apply to it for change of venue. No such objection may be made, however, in respect to criminal proceedings; since in criminal proceedings actual presence of the accused before the tribunal is a prerequisite of power to do anything and the accused will in any event actually be before the tribunal to the competency whereof objection is made.

III. *Questions of law conclusive of the controversy, or of some part thereof, should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court, and in any other court to which the cause may be taken for review, to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.*

This proposition was recommended in 1909 in the report of the special committee of the American Bar Association on delay and expense in legal procedure and was adopted overwhelmingly. (34 Rep. Am. Bar Ass'n, 22.) It is discussed in that report (34 Rep. Am. Bar Ass'n, 582, 585) and also in a paper in 4 Ill. Law Rev., 503-504.

IV. *Any court to which a cause is taken for review should have power to take additional evidence by affidavit, deposition, or reference, as rule of court may prescribe, for the purpose of sustaining a verdict wherever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to have been competent.*

This proposition was recommended by the committee of the American Bar Association, above referred to (34 Rep. Am. Bar Ass'n, 598-600). Two objections have been made to it:

(1) That it infringes on trial by jury.

(2) That it will take up the time of the Appellate Court unduly.

To the first it may be answered that the jury does not pass upon questions of fact involved in the admissibility of evidence. A court must determine them in any event. If the evidence was, in fact,

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receivable it matters not for any but pure formal purposes at what time its admissibility is established.

On a new trial a new jury would pass exactly upon the same evidence as that already passed on. If the evidence is an incontrovertible record, the trial court would instruct the jury to give the effect to it which is now invoked to save the verdict. As to the other objection, it may be answered that errors of the sort will not be urged on appeal or error when it is known that they can and will be cured.

V. *No conviction should be set aside or new trial granted for error as to any matter of procedure unless it shall appear to the reviewing court that the error complained of has (a) resulted in a conviction not authorized by substantive law or (b) deprived the accused of some right given by adjective law to insure a fair opportunity to meet the case against him or a full opportunity to present his own.*

This principle has been approved three times by the American Bar Association by an overwhelming majority of those voting (33 Rep. Am. Bar Ass'n, 542, 546; 34 Am. Bar Ass'n, 82).

For further discussion of this matter, see Wigmore Pocket Code of Evidence, page XI, rule 23, and paper of Everett P. Wheeler, 21 Green Bag, 57; also papers noted in the bibliography appended thereto.

APPENDIX.

Rules as to Indictments Proposed by H. L. Stephen.

(These rules are based on the draft code approved by the English law officers of 1880, and the principles approved by a committee consisting of Lord Blackburn, Justices Lush, Barry, and Stephen. See Stephen, Indictments and the Rule Committee, 14 Law Quarterly Review, 260, 262. Some rules not applicable in this country are omitted.)

1. Omitted.
2. Provides for the form of indictments. See the examples given above.
3. One indictment may contain any number of counts, provided that to a count charging murder no count charging any offense other than murder or being accessory to murder shall be joined; and one indictment may contain counts for both felony and misdemeanor. Each count in an indictment may be treated as a separate indictment; and shall be tried separately, unless the court otherwise orders. One count may charge any number of offenses, and felonies and mis-

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demeanors may both be charged in one count; but one count shall not in general present more than one transaction. . . .

Where the court considers that an accused person may be embarrassed in his defense by more than one offense being charged as arising out of one transaction, or by more than one transaction being presented in one count, the court may amend the count by dividing it as they see fit, or may put the prosecutor to his election as to which one or more of the offenses charged, or of the transactions presented, he will proceed on; and the court shall have absolute discretion as to the offenses or transactions between which the prosecutor is to make his election

The idea is that one indictment will contain all the charges to which a prisoner is liable; a count will take the place, roughly speaking, of an indictment of to-day; but each count will contain only one set of facts. Each count will consequently be tried separately.

. . . .

4. Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offense or offenses therein specified.

Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved. The crime may be described by the term by which it is commonly known, or in the words of the enactment describing the crime or declaring the matter charged to be a crime, or in any words sufficient to give the accused notice of the crime with which he is charged.

Every count shall contain so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to. A count may refer to any section or part of any section, of any statute creating the offense charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference. . . .

5. The court may, before the verdict is given, make any amendment in an indictment or in an amended indictment, and may, if the amendment is calculated to embarrass the prisoner in his defense, shall cause the trial to be adjourned In considering whether an indictment ought to be amended, the court may have regard to the [preliminary examination].

The court may make any amendments in any pleading other than an indictment, or in any particulars that they may make in case of an indictment.

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Note.—This is the most important proposal of all. . . .
In theory it enables a judge to try a man for murder when he has been committed for larceny. I have tried to limit the judges' power to amendments which would cause the prisoner to be tried only for the same kind of offense as that of which he is accused, but without any satisfactory result; and I suggest it is better to leave the matter in the simple way I have put it. . . .

6. Omitted.

7. In an indictment for perjury it shall be sufficient to specify the court before which it was committed and its sitting, without alleging that it was properly constituted or competent to administer an oath. It shall not be necessary to state that the statement was material; a general statement of its falsity shall be sufficient.

8. The same as to false pretenses as far as their falsity is concerned

9. The prosecutor may at any time before the trial give to the accused and to the court particulars of the offense charged in the indictment, and the court may at any time order the prosecutor to give such particulars upon such terms as to them shall seem just.
. . . .

10 and 11. Omitted.

12. Every count shall be deemed divisible; and if the commission of the crime charged, as described in the enactment creating the crime or as charged in the count, includes the commission of any other crime, the person accused may be convicted of any crime so included which is proved, although the whole crime charged is not proved; or he may be convicted of an attempt to commit any crime so included, provided that on a count for murder the jury shall not find the prisoner guilty of any other offense than murder or manslaughter or an attempt to commit murder. . . .

13. No objection shall be taken to an indictment except by a motion to quash, which may be made at any time previous to judgment; [or] by motion in arrest of judgment, which may be made after conviction and before judgment. . . .

Demurrers are abolished. If a copy of the indictment is served on the prisoner within days of the trial, no objection may be taken to it without leave of the court, except by a written notice served on the prosecution within days of the trial stating what objections will be taken; in which case no objection may be made which is not stated in the notice except by leave of the court.

14. Omitted.